Supreme Court, U. S.
FILED
MAR 3 1978
MICHAEL RODAK, JR., CLERK

No. 77-528

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER
v.
PACIFICA FOUNDATION, RESPONDENT

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals is reported at 556 F. 2d 9 (App. 45). The opinions of the Federal Communications Commission are reported at 56 FCC 2d 94 (App. 6) and 59 FCC 2d 892 (App. 41).

JURISDICTION

The court of appeals entered judgment on March 16, 1977 (App. 115), and denied a timely petition for rehearing on May 10, 1977 (App. 117). This Court granted the FCC's timely petition for a writ of certiorari on January 9, 1978, and has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2350(a).

QUESTIONS PRESENTED

1. Whether the peculiar characteristics of the broadcast media and the requirement that broadcast licensees operate their stations consistently with the public interest justify the prohibition of "indecent" language as a separate category from "obscene" language, for purposes of regulatory action.

2. Whether the Federal Communications Commission acted lawfully and reasonably in finding a violation of the prohibition against "indecent" language where a licensee had deliberately and repetitiously broadcast words which describe sexual and excretory functions and organs in a manner that was patently offensive by contemporary community standards for the broadcast media, at a time when children were in the audience.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part:

> The Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

Section 1464 of Title 18 of the United States Code, 62 Stat. 769, 18 U.S.C. § 1464, provides:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Section 312(a) of the Communications Act of 1934, 48 Stat. 1064, as amended, 74 Stat. 889, provides:

> The Commission may revoke any station license or construction permit—
>
> * * *
>
> (6) for violation of section * * * 1464 of title 18 of the United States Code.

Section 312(b) of the Communications Act, as amended, 74 Stat. 889, provides:

> Where any person * * *
>
> (2) has violated or failed to observe any of the provisions of this Act, or section * * * 1464 of title 18 of the United States Code * * *, the Commission may order such person to cease and desist from such action.

Section 326 of the Communications Act of 1934, 48 Stat. 1091, as amended by 62 Stat. 769, provides:

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Section 503(b)(1) of the Communications Act, as amended, 74 Stat. 889, provides:

> Any licensee or permittee of a broadcast station who—
>
> * * *
>
> (E) violates section * * * 1464 of title 18 of the United States Code,
>
> shall forfeit to the United States a sum not to exceed $1,000. Each day during which such vio-

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lation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this Act.

STATEMENT

Radio station WBAI–FM broadcast a recorded comedy monologue which discussed and repeatedly uttered "the words you couldn't say on the public * * * airwaves." (App. 8–9, 19, 109.) A listener, who had heard the broadcast while driving with his young son, complained to the FCC, pointing out that the monologue had included the words "cocksucker," "cunt," "fuck" and "shit," and asking what the FCC intended to do about it. (App. 2–3.) After obtaining the station's response to the complaint, the Commission issued a declaratory order holding that certain words in the recorded monologue "as broadcast" were indecent because (1) the words described sexual and excretory functions and organs in a manner that was patently offensive by contemporary community standards for the broadcast media; (2) children were in the audience at the time of the broadcast; and (3) the station made the broadcast deliberately with knowledge of the repetitious use of offensive words in the pre-recorded monologue. (App. 16–17.)

A divided panel of the District of Columbia Circuit reversed the Commission's decision (App. 45), and this Court granted the Commission's petition for a writ of certiorari.

In this statement, we describe briefly the statutory and regulatory background in which the Commission

acted, and the pertinent facts of the Pacifica controversy, including the rulings of the FCC and the court of appeals.

A. *Statutory Prohibitions.* Section 1464 of the criminal code, 18 U.S.C. § 1464, prohibits the utterance of obscene, indecent or profane language by means of radio. The prohibition originated as part of Section 326 of the Communications Act, 47 U.S.C. § 326, and was shifted to the criminal code in 1948 as part of a comprehensive revision of federal criminal law.[1] As adopted by Congress in 1934, Section 326 stated:

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. *No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.* 48 Stat. 1064, 1091 [emphasis added].

Thus, the prohibition of obscene and indecent language originally was part of the same statute that forbids the Commission to censor radio communications or to interfere with free speech by means of radio.

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[1] *Gagliardo* v. *United States*, 366 F. 2d 720, 723 (9th Cir. 1966). Section 326, in turn, had been derived from Section 29 of the Radio Act of 1927, 44 Stat. 1162, 1172.

Although 18 U.S.C. § 1464 authorizes criminal sanctions that may be imposed only after trial in a district court, the Commission has concurrent enforcement responsibilities with the Department of Justice.[2] The Commission has explicit statutory authority to revoke broadcast licenses, to issue cease and desist orders, and to impose money forfeitures for conduct which would be in violation of the substantive prohibitions of Section 1464. See 47 U.S.C. §§ 312 (a) and (b), 503(b)(1)(E). The Commission also may deny license renewal or grant a short-term renewal. 47 U.S.C. §§ 307, 308. Finally, the Commission has authority to issue declaratory orders, "with like effect as in the case of other orders," to terminate a controversy or remove uncertainty. 5 U.S.C. § 554(e). See also 47 C.F.R. § 1.2.

At the time of the Commission's declaratory order in this case, the federal courts that had addressed the matter had not construed "indecent" as subsumed in "obscene" for purposes of Section 1464. The Ninth Circuit, in *Gagliardo* v. *United States,* 366 F. 2d 720 (1966), had concluded that the district court should define "indecent" in the first instance, and had expressly declined to rule that there was no separate prohibition of "indecency" in the statute.[3] The Sev-

[2] *Cf. Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 289 (1954).

[3] The Ninth Circuit rejected the argument that an earlier decision under the Radio Act, *Duncan* v. *United States*, 48 F. 2d 128 (9th Cir.), *cert. denied*, 283 U.S. 863 (1931), had equated indecency with obscenity for purposes of the broadcast statute. 366 F. 2d at 725 n. 7.

enth Circuit in two recent cases had suggested that "obscene" and "indecent" had separate and distinct meanings in Section 1464. *Tallman* v. *United States,* 465 F. 2d 282 (1972); *United States* v. *Smith,* 467 F. 2d 1126 (1972). *Smith* had held that the district court, in any retrial, should define the words "profane" and "indecent" for the jury. 467 F. 2d at 1130.[4] See also *Illinois Citizens Committee* v. *Federal Communications Commission,* 515 F. 2d 397, 404 n. 14 (D.C. Cir. 1975), which did not decide whether there was a separate prohibition of "indecency" because it affirmed the Commission on the ground that the language was "obscene."

B. *FCC Regulation Under Section 1464.* Although broadcasters enjoy broad discretion in programming,[5] they also have special public responsibilities which derive both from their status as licensees under the public interest standard and from the peculiar charac-

[4] After the court of appeals had reversed the Commission in this case, the Seventh Circuit changed its reading of Section 1464 and held that the proscription of obscene and indecent language in that statute should be read as a single proscription. *United States* v. *Simpson*, 561 F. 2d 53 (7th Cir. 1977). Although it reversed the jury's finding that certain language was criminal under the "indecency" standard, the court said in a footnote that it "would have had no difficulty in affirming a finding that the language was obscene * * *." 561 F. 2d at 55 n. 1. The court also stated that the "balance between the speaker and listener must tip in favor of the listener" at some point, though it did not locate that point. *Id.* at 60 n. 8.

[5] *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94 (1973): *Cf. Farmers Union* v. *WDAY*, 360 U.S. 525 (1959).

teristics of the media.[6] As this Court has recognized, "the broadcast media pose unique and special problems not present in the traditional free speech case."[7] The "unusual order of First Amendment values" in the broadcasting context has required Congress, the agency and the courts to perform the difficult and delicate task of balancing "the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed * * *."[8]

In this context, it is not surprising that Congress has forbidden both censorship, 47 U.S.C. § 326, and the broadcast of obscene, indecent or profane language, 18 U.S.C. § 1464.[9] In respecting these apparently divergent commands by Congress, the Commission has walked a "tightrope" between saying too much about programming and saying so little as to abdicate its responsibility.[10]

Decisions renewing broadcast licenses in the face of serious complaints about "offensive" program-

[6] *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367 (1969); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943). See generally, *Programming Policy Statement*, 44 FCC 2303 (1960).

[7] *Columbia Broadcasting System*, 412 U.S. at 101.

[8] *Id.* at 101–02.

[9] Congress also has prohibited broadcasts of lottery information, 18 U.S.C. § 1304, and fraud by radio, 18 U.S.C. § 1343. Each of these prohibitions is enforceable through administrative action by the FCC as well as in criminal courts. 47 U.S.C. §§ 312 (a) and (b), 503(b)(1)(E).

[10] *Banzhaf* v. *Federal Communications Commission*, 405 F. 2d 1082, 1095 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); *Columbia Broadcasting System*, 412 U.S. at 105.

ming illustrate both the broad discretion conferred on licensees and the delicacy of the agency's balancing act.

The Commission in 1964 renewed the licenses of Pacifica, the respondent in this case, despite complaints alleging that the stations had carried "offensive" and "filthy" programs. The Commission agreed that the programs probably had offended some listeners.[11] But it declined to rule such programs off the air:

> [S]uch provocative programming as here involved may offend some listeners. But this does not mean that those offended have the right, through the Commission's licensing power, to rule such programming off the airwaves. Were this the case, only the wholly inoffensive, the bland, could gain access to the radio microphone or TV camera. * * * Pacifica's judgments as to the above programs clearly fall within the very great discretion which the act wisely vests in the licensee.

Pacifica Foundation, 36 FCC 147, 149 (1964). The Commission's decision in that case was reinforced by the fact that Pacifica had taken into account the nature of the broadcast medium by scheduling the programs in the late evening (after 10 p.m.) when the

[11] Over the three-year licensing period, Pacifica had aired some five programs that had prompted complaints about the use of swear words and discussion of such "sensitive" topics as homosexuality. *Pacifica Foundation*, 36 FCC 147 (1964).

number of children in the audience was at a minimum. *Id.* & n. 3.[12]

Two more recent cases dealing specifically with Section 1464 are essential to an understanding of the Commission's finding of indecency in the present Pacifica case.

The Commission imposed a $100 forfeiture on a Philadelphia station in 1970 after finding that the station had broadcast an interview in which the guest had used the words "fuck" and "shit" gratuitously and repeatedly throughout the program. The Commission held that the words in themselves were not obscene under the standards set forth in this Court's decisions because they did not appeal to the "prurient interest" of listeners.[13] But the Commission gave separate meaning to the prohibition of "indecent" language in Section 1464. It found that this language, which "fosters no debate, serves no social purpose, and would drastically curtail the use of radio for millions of people," was indecent when broadcast at a time when children were in the audience. ***Eastern Educational Radio (WUHY-FM)***, 24 FCC 2d 408 (1970).

[12] See also *Anti-Defamation League of B'nai B'rith*, 4 FCC 2d 190 (1966), *aff'd*, 403 F. 2d 169 (D.C. Cir.), *cert. denied*, 394 U.S. 930 (1969), where the Commission renewed a radio license despite complaints that the station had refused to censor anti-Semitic material from certain programs. The Commission said that "its function is not to judge the merit, wisdom, or accuracy of any broadcast discussion or commentary * * *." *Id.* at 191.

[13] *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1965); *Roth* v. *United States*, 354 U.S. 476 (1956).

The Commission relied crucially upon the differences between radio and other media and the likelihood of exposure of children to offensive material in articulating its indecency standard:

> *[I]t is crucial to bear in mind the difference between radio and other media.* Unlike a book which requires the deliberate act of purchasing and reading (or a motion picture where admission to public exhibition must be actively sought), broadcasting is disseminated generally to the public * * * under circumstances where reception requires no activity of this nature. Thus, it comes directly into the home and frequently without any advance warning of its content. Millions daily turn the dial from station to station. While particular stations or programs are oriented to specific audiences, the fact is that by its very nature, thousands of others not within the "intended" audience may also see or hear portions of the broadcast. Further, in that audience are very large numbers of children. * * * No one could ever know, in home or car listening, when he or his children would encounter what he would regard as the most vile expressions, serving no purpose but to shock, to pander to sensationalism.

24 FCC 2d at 411. The Commission said the test for "indecency" was whether the material was (1) patently offensive by contemporary community standards, and (2) utterly without redeeming social value, without regard to any appeal to the prurient interest. 24 FCC 2d at 412.

The Commission recognized that it was acting in a sensitive constitutional area and invited a judicial test of its standard:

> [A] most crucial peg underlying all Commission action in the programming field is the vital consideration that the courts are there to review and reverse any action which runs afoul of the First Amendment. * * * [W]e would welcome such review, since only in that way can the pertinent standards be definitively determined.

24 FCC 2d at 415. The station did not seek judicial review.

Three years later, in response to complaints about a so-called "topless radio" program in which a talk show host discussed sexual topics with call-in listeners, the Commission imposed a forfeiture of $2,000 on the licensee for using obscene and indecent language. The programs, broadcast in the early afternoon, had consisted in large part of conversations in explicit terms about such matters as oral sex, including graphic descriptions by callers of their own experiences and fantasies. The Commission found that the host of the show had "coaxed responses that were designed to titillate—to arouse sexual feelings." *Sonderling Broadcasting Corp.*, 27 Pike & Fisher Rad. Reg. 2d 285, 290, *reh. denied*, 41 FCC 2d 777 (1973), *aff'd sub nom. Illinois Citizens Committee* v. *FCC*, 515 F. 2d 397, *reh. denied*, 515 F. 2d 407 (D.C. Cir. 1975).

In that case, because the Commission found both an appeal to the prurient interest and a strong element

of pandering,[14] it held the broadcasts to be obscene. The Commission relied heavily upon the pervasive and intrusive qualities of radio and the presence of children in the audience during the early afternoon hours.[15] On reconsideration, the Commission expanded on the importance of children to its decision:

> [W]e concluded that the material broadcast by Sonderling was impermissible even without taking children into consideration. * * * We went on to point out, however, that children were "in the audience during these afternoon hours," and we cited evidence which indicated that the program was "not intended solely for adults." From this, we concluded that "the presence of children in the broadcast audience makes this an *a fortiori* matter." The obvious intent of this reference to children was to convey the conclusion that this material was unlawful, and that it was even more clearly unlawful when presented to an audience which included children.

41 FCC 2d at 782.

The Commission stated, as an alternative ground for its *Sonderling* decision, that the broadcasts also had violated the prohibition against indecent language, as set forth in Section 1464 and applied in *WUHY–FM*.[16] It found that some of the "topless radio" broad-

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[14] *Ginzburg* v. *United States*, 383 U.S. 463 (1966).

[15] In fact, the Commission found evidence that the program had not even been *intended* solely for adults, but that it had explicitly solicited young listeners. 27 Pike & Fischer Rad. Reg. 2d at 292.

[16] *Eastern Educational Radio* (*WUHY–FM*), 24 FCC 2d 408.

casts had been patently offensive by contemporary community standards for broadcast matter and utterly without redeeming social value. 27 Pike & Fischer Rad. Reg. 2d at 290, 292.

Once again, the Commission "welcome[d] and urge[d] judicial consideration of our action." *Id.* at 293. Although the licensee paid the forfeiture and did not seek judicial review, a citizens group did take the matter to court. In a unanimous opinion, the District of Columbia Circuit affirmed the finding of obscenity, relying significantly upon the pandering aspects of the program and the presence of children in the audience. *Illinois Citizens Committee* v. *FCC,* 515 F. 2d at 404–05. The Court did not reach the question of "the constitutionality of its [the FCC's] interpretation and application of the term 'indecent.' "[17]

In summary, at the time of the Commission's ruling on the Pacifica complaint, there was a growing body of regulatory caselaw establishing and applying standards of indecency as well as obscenity in broadcasting. Protection of children, recognition of privacy rights, and concern about the intrusive nature of the broadcast media were factors the Commission and the courts had recognized as relevant. Although the courts had not had occasion to rule directly on the separate standards for indecency, the Seventh and Ninth Circuits at least had contemplated that such standards might be permis-

[17] On a petition for rehearing and suggestion for rehearing *en banc*, only Chief Judge Bazelon stated that he had voted to grant rehearing *en banc*. 515 F. 2d. at 407.

sible.[18] The District of Columbia Circuit had expressly avoided the indecency question in *Sonderling.*

C. *The Controversy.* The Pacifica Foundation operates WBAI–FM in New York City as a non-commercial radio station. Its broadcast of a recorded monologue during the early afternoon provoked a complaint by a man who had heard the broadcast while driving his car. The complaint stated:

> Whereas I can perhaps understand an "X-rated" phonograph record's being sold for private use, I certainly cannot understand the broadcast of same over the air * * * . Any child could have been turning the dial, and tuned in to that garbage.

(App. 2.) The man added that his young son was with him when he heard the broadcast, "and, unfortunately, he can corroborate what was heard." (App. 3.) The Commission forwarded the complaint to Pacifica and asked for its response.

Pacifica stated in its response that the complaint grew out of "a satirical monologue broadcast during the course of a regularly scheduled live program * * * at approximately 2:00 p.m." Pacifica identified the monologue as one from the record album "George Carlin, Occupation: FOOLE." The program had consisted that day of commentary and discussion with

[18] *Tallman* v. *United States*, 465 F. 2d 282; *United States* v. *Smith*, 467 F. 2d 1126; *Gagliardo* v. *United States*, 366 F. 2d 720 These were all criminal prosecutions under Section 1464, rather than regulatory actions. *United States* v. *Simpson*, 561 F. 2d 53, which later held that indecency was subsumed in obscenity, also was a criminal case.

call-in listeners on "contemporary society's attitudes toward language." (App. 3–4.) Pacifica offered the following explanation or justification, which we quote at length:

> The selection from the Carlin album was broadcast towards the end of the program because it was regarded as an incisive satirical view of the subject under discussion. Immediately prior to the broadcast of the monologue, listeners were advised that it included sensitive language which might be regarded as offensive to some; those who might be offended were advised to change the station and return to WBAI in 15 minutes. To our knowledge, Mr. Douglas is the only person who has complained about either the program or the George Carlin monologue.
>
> George Carlin is a significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl. Like Twain, Carlin finds his material in our most ordinary habits and language—particularly those "secret" manners and words which, when held before us for the first time, show us new images of ourselves.
>
> His stories of childhood life on New York's city streets, parochial school, have a common purpose—to make us laugh at ourselves so that we may discover the common humanity beneath our social forms. More particularly, Carlin, like Twain and Sahl before him, examines the language of ordinary people. In the selection broadcast from his album, he shows us that words which most people use at one time or another cannot be threatening or obscene. Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words.
>
> As with other great satirists—from Jonathan Swift to Mort Sahl—George Carlin often grabs our attention by speaking the unspeakable, by shocking in order to illuminate. Because he is a true artist in his field, we are of the opinion that the inclusion of the material broadcast in a program devoted to an analysis of the use of language in contemporary society was natural and contributed to a further understanding of the subject.

(App. 3–4).

Pacifica later informed the Commission that it had no recording or transcript of the program, and that no script had been prepared in advance for the live broadcast. (App. 5.) The Commission obtained a copy of the Carlin recording and made its own transcript of the monologue, entitled "Filthy Words." (App. 19–24.) The monologue runs about 11 minutes and 45 seconds.

Pacifica did not deny that the words it had broadcast were offensive by contemporary community standards for the broadcast media. It did not deny that the broadcast had occurred at a time when children undoubtedly were in the audience, nor did it attempt to justify its selection of that time period for such a broadcast. Its sole justification was the statement quoted above.

In its opinion and order released February 21, 1975 (App. 6), the Commission stated that it was not retreating from previous decisions recognizing the broad programming discretion broadcast licensees en-

joy. It was concerned in this case, it said, with a limited number of patently offensive words in the unique context of broadcasting. As it had done in *Eastern Educational Radio* (*WUHY–FM*), the Commission recognized that the words were not obscene because there was no appeal to the prurient interest.

The Commission once again identified and discussed the peculiar characteristics of radio that justify the unusual order of First Amendment values (App. 12–13):

1. Children have easy access to radio and in many cases are unsupervised by parents or other responsible adults.

2. Radio receivers are in the home where individual rights to privacy are entitled to particular respect.

3. Unconsenting adults may tune into a station without warning that offensive language is to be broadcast.

4. The scarcity of radio frequencies requires government regulation through licensing in the public interest.[19]

Rather than issue a sweeping ban of offensive language, however, the Commission approached the problem more narrowly, both by focusing its ruling on the language "as broadcast" and by trying to

[19] In addition, the Commission acknowledged its express statutory responsibility to promote the larger and more effective use of radio in the public interest. 47 U.S.C. § 303(g). Widespread use of indecent words would impair the usefulness of radio as an effective communications medium for all, and particularly to children and unconsenting adults, the FCC said. (App. 18.)

"channel" such material away from the times when children were most likely to be in the audience. Placing the problem in general context, the Commission stated:

> [P]atently offensive language, such as that involved in the Carlin broadcast, should be governed by principles which are analogous to those found in cases relating to public nuisance. *Williams* v. *District of Columbia,* 136 U.S. App. D.C. 56, 419 F. 2d 638 (*en banc* 1969); *Von Sleichter* v. *United States,* 153 U.S. App. D.C. 169, 472 F. 2d 1244 (1972). Nuisance law generally speaks to *channeling* behavior more than actually prohibiting it. The law of nuisance does not say, for example, that no one shall maintain a pigsty; it simply says that no one shall maintain a pigsty in an inappropriate place, such as a residential neighborhood.

(App. 14.) The Commission then tied its analysis to the interest it considered most important:

> [I]t is important to make it explicit whom we are protecting and from what. As previously indicated, the most troublesome part of this problem has to do with the exposure of children to language which most parents regard as inappropriate for them to hear. This parental interest has "a high place in our society." See *Wisconsin* v. *Yoder,* 406 U.S. 205, 214 (1972), and cases cited therein. Therefore, the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium,

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> sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.

(App. 14–15.)

Distinguishing the kind of language it was "channeling" to late hours from "obscene" language that could be banned altogether, the Commission stated:

> In our view, indecent language is distinguished from obscene language in that (1) it lacks the element of appeal to the prurient interest, *WUHY-FM,* 24 FCC 2d at 412, and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value.

(App. 15.) When the danger of exposure to children is reduced, the Commission said, "a different standard might conceivably be used." The definition of indecent would remain the same; but the agency would consider whether the matter broadcast, despite its use of offensive language, had serious literary, artistic, political or scientific value. (App. 15–16.)

The Commission then stated its holding on the facts of this case, applying the principles it had articulated:

> [T]he Commission concludes that words such as 'fuck', 'shit', 'piss', 'motherfucker', 'cocksucker', 'cunt', and 'tit' depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly 'indecent' when broadcast on radio or television. These words were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast. We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. 1464.

(App. 16–17.) No sanctions were imposed.

The Commission explained that it was using a declaratory order in this case "to terminate the present controversy between a listener and the station, and to clarify the standards which the Commission utilizes to judge 'indecent language.'" Such an order, it said, also "will permit all persons who consider themselves aggrieved or who wish to call additional factors to the Commission's attention to seek reconsideration." (App. 17.) Pacifica did not seek reconsideration.[20]

D. ***The Decision Below.*** On April 28, 1975, Pacifica sought judicial review. In the court of appeals, Pacifica relied for the first time on factual materials and legal arguments which it had never advanced before the Commission.[21]

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[20] The Radio Television News Directors Association filed a petition for clarification, and, in response, the Commission emphasized again that it had not banned indecent language altogether "but rather sought to channel it to times of day when children most likely would not be exposed to it." The agency also stated that it would not hold licensees responsible for indecent language broadcast during live coverage of public or news events. (App. 42, 43 n. 1.)

[21] The factual materials included literary works containing words allegedly encompassed by the Commission's definition of indecent; examples from the White House Tapes; and excerpts from newspapers and magazines. These materials appeared in Pacifica's Appendix B, 28–44, in the court below, and were relied

(Continued)

A sharply divided panel of the D.C. Circuit reversed the Commission's order. Circuit Judge Tamm, in one opinion, did not reach "the perplexing question whether the FCC, because of the unique characteristics of radio, and television, may prohibit non-obscene speech". (App. 46.) Judge Tamm agreed with the Commission that "indecency" in 18 U.S.C. § 1464 had never been construed authoritatively by the federal courts (App. 56–57); but, without resolving that question, he concluded that the Commission's order was overbroad and vague in violation of the no-censorship prohibition of 47 U.S.C. § 326. (App. 64.) Judge Tamm did not consider whether the language "as broadcast" was indecent.

Chief Judge Bazelon, concurring in Judge Tamm's result but not in his reasoning, took the position that the Commission's definition of "indecent" abridged the First Amendment because Section 1464 prohibits only hard core pornography meeting all of the tests set forth in *Miller* v. *California,* 413 U.S. 15 (1973).

Judge Bazelon conceded, as the caselaw required him to do, that "[n]o single Supreme Court decision directly forecloses" the Commission's argument in

(Continued)
upon in the court's opinion. (App. 54 n. 15, 60 n. 19). Section 405 of the Communications Act provides that no question of fact or law may be raised on appeal which has not first been raised before the Commission. "Under 47 U.S.C. § 405 [a] court is precluded from entertaining objections to issues which the Commission has not first been invited to rule upon through a petition for rehearing." *Hansen* v. *FCC*, 413 F. 2d 374, 376 (D.C. Cir. 1969).

favor of a separate "indecency" concept for the broadcast media. (App. 78–79.) However, he found that recognition of such a concept would go beyond any of the Court's decisions. Thus, also without reviewing the narrow ruling on the language "as broadcast," Judge Bazelon found the Commission's order overbroad.

In dissent, Judge Leventhal said that the fundamental error of the two majority opinions was their failure to review the narrow case that was before the court, limited to the language as broadcast (1) in the early afternoon when children were in the audience, and (2) with "persistent, almost lavishly loving reiteration of the special words * * *." (App. 91, 98.) Restricting his own scrutiny to the controversy over Pacifica's broadcast of the Carlin monologue in the early afternoon, Judge Leventhal found no violation of statutory or constitutional restrictions by the Commission. He said he would affirm the Commission's "effort to define 'indecent' in terms of the same underlying considerations as those which prompted the Supreme Court in *Miller.*"[22] Judge Leventhal concluded:

> In the last analysis, the FCC's opinion on what is "indecent" stands as a functional equivalent to the Supreme Court's current "obscenity" ruling (*Miller*), save for an adaptation to bridge the difference posed by the characteristic of radio presentation.

(App. 97.)

[22] *Miller* v. *California*, 413 U.S. 15 (1973).

SUMMARY OF ARGUMENT

I

This case presents to the Court two issues for resolution. The first and broader question is whether the term "indecent" in 18 U.S.C. § 1464 should be subsumed into the term "obscene" as it has in some other federal statutes. In construing the "indecent" as used in other federal statutes, this Court has indicated that the indecent would be subsumed into the obscene as defined in *Miller* v. *California*, 413 U.S. 15 (1973). See, *e.g.*, *Hamling* v. *U.S.*, 418 U.S. 87 (1974). However, the Court has been very careful not to refer to Section 1464, which applies to radio communication. On the other hand, the Court has consistently recognized that broadcasting differs from other methods of communications, giving rise to "unique and special problems not present in the traditional free speech case." See, *e.g.*, *Columbia Broadcasting System*, 412 U.S. at 101.

(1) Four factors were identified in the Commission's decision which warrant giving special meaning to the "indecent" as it applies to radio communication: children have easy access to radio and in many cases are unsupervised by parents or other responsible adults; radio receivers are in the home, where individual rights to privacy are entitled to particular respect; unconsenting adults may tune into a station without warning that offensive language is to be broadcast; and the scarcity of radio frequencies requires government regulation through licensing in the public interest.

A concern for children was at the heart of the Commission's interpretation of the indecency prohibition in Section 1464. It also relied on this Court's recognition that the parental interests in the "upbringing and education of their children in their early and formative years have a high place in our society." *Wisconsin* v. *Yoder*, 406 U.S. 205, 213–214; *Ginsberg* v. *New York*, 390 U.S. 629, 637–643 (1968). To a lesser extent the Commission also sought to afford some protection to unconsenting adults who did not want indecent material thrust upon them in the sanctuary of their homes. *Rowan* v. *Post Office Dept.*, 397 U.S. 728, 738 (1970). (App. 16.)

(2) Besides the intrusive and pervasive qualities of broadcasting, which require special treatment, from the beginning of government regulation of radio, federal courts have recognized that broadcasters are public trustees subject to a higher standard of conduct than the morals of the marketplace. *KFKB Broadcasting Ass'n* v. *F.R.C.*, 47 F. 2d 670 (D.C. Cir. 1931). Broadcasters must program in the interest of the community they are licensed to serve, and the Commission may not renew a broadcast license unless it finds that a broadcaster has ascertained and served the needs of its community *United Church of Christ* v. *FCC*, 425 F. 2d 543 (D.C. Cir. 1969); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

Broadcasters must also give special attention to the programming needs of children. "Broadcasters have a special responsibility to children," because of their immaturity. *Children's Television Report and Policy Statement,* 50 FCC 2d 1, 5, and 11 (1974). The Commission has also reported to Congress that licensee self-regulation is more desirable than rigid governmental standards to protect children from objectionable programs dealing with sex and violence. Obscene and indecent material is proscribed by statute, and the Commission will meet its responsibility in this area. *Report on Broadcast of Violent, Indecent and Obscene Material,* 51 FCC 2d 418 (1975).

II

The second issue presented is much narrower: whether the Commission reasonably concluded that certain words in the Carlin monologue were indecent "as broadcast." Its holding was based on the following undisputed factors: the words broadcast depicted "sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium"; the words were broadcast "when children were undoubtedly in the audience * * * in the early afternoon"; the words had been "prerecorded," were "repeated over and over and were deliberately broadcast." Judge Leventhal would have affirmed this holding because it necessarily included the limitations of time, the early afternoon, and the manner of presentation, deliberate repetition. (App. 94, 104.)

The majority below, without ever focusing on the Commission's specific ruling, concluded that the Commission's order was vague and overbroad. As Judge Leventhal observed, the basic error of the majority grew out of their failure to review the narrow case that was before the court, limited to words broadcast in the early afternoon when children were in the audience and with "persistent almost lavishly loving reiteration of the special words * * *." (App. 91, 98.) Society has a special concern to protect young children from sexually explicit materials. *Miller* v. *California,* 413 U.S. at 19; *Ginsberg* v. *New York,* 390 U.S. at 637–43. Here the FCC in essence held that the broadcast licensee had abused its special trust by broadcasting for nearly twelve minutes a record which repeated over and over words which depict sexual and excretory organs and activities in a manner patently offensive by its community's contemporary standards in the early afternoon when children were in the audience.

Government has the authority and duty to assist parents "in their protection of young children during the uniquely prolonged period of development needed to permit the emergence of a competent and consenting person, and to protect some privacy in the home and in residential and civic neighborhoods that are family areas of shared community space. The latter consideration is not priggishness, but reflects a value that Alexander Bickel identified * * * as society's concern with the quality of its community life." (App. 106–107.) Restrictions may be

imposed because of broadcasting's intrusion into the privacy of the home and its captivity of young unsupervised children. *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 209 (1975). In the past, broadcasters have made time distinctions, and time, place, and manner of speech may be regulated by channeling and zoning. *Young* v. *American Mini Theaters, Inc.,* 427 U.S. 50, 63 n. 18 (1976). Here, "protection of children is a compelling state interest," and this nation's law "is an ethical determinant and a moral force." (App. 107 & n. 18.)

ARGUMENT

I. THE PECULIAR CHARACTERISTICS OF BROADCASTING AND THE SPECIAL PUBLIC OBLIGATIONS OF BROADCAST LICENSEES PERMIT THE COMMISSION TO REGULATE INDECENT LANGUAGE IN SUCH A WAY AS TO PROTECT UNSUPERVISED CHILDREN, EVEN THOUGH THE LANGUAGE MIGHT NOT BE OBSCENE.

Pacifica urged in the court below that the term "indecent" is subsumed in the term "obscene" and that Section 1464 prohibits only hard core obscenity as defined in *Miller* v. *California,* 413 U.S. 15. In Pacifica's view, a station may broadcast any material which does not meet the *Miller* test, regardless of the time of day or composition of the audience.[23]

[23] The transcript of some recent broadcasts on an educational station in Philadelphia illustrates a logical extension of Pacifica's abstract principle. Much of the material, while apparently indecent, is not hard core pornography. On December 4, 1975, the Commission issued a Notice of Apparent Liability for violations of 18 U.S.C. § 1464. The Commission employed the indecency standard enunciated in the declaratory order challenged here. See Addendum to FCC Petition for Certiorari in this case, and 57 FCC 2d 782 (1975).

Judge Tamm did not reach this question. (App. 45–64.) Chief Judge Bazelon appeared to agree with Pacifica. (App. 64–91.)

At the time of the Commission's Order, all judicial precedent indicated that "indecent" had a separate and distinct meaning from "obscene" in Section 1464. *Tallman* v. *U.S.,* 465 F. 2d 282, for example, rejected the argument that the term "indecent" was unconstitutionally vague. There the court found that "indecent" conveyed "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." 465 F. 2d at 285. See also *U.S.* v. *Smith,* 467 F. 2d 1126; *Gagliardo* v. *United States,* 366 F. 2d 720. *Cf. Williams* v. *District of Columbia,* 419 F. 2d 638.

If *United States* v. *Twelve-200 Ft. Reels of Super 8mm Film,* 413 U.S. 123 (1973), is controlling here, Pacifica's argument may be correct. See also *United States* v. *Simpson,* 561 F. 2d 53, 60. But this Court has never addressed the broadcast context in construing the "indecent" as a separate concept from the "obscene." In *Twelve-200 Ft. Reels,* this Court considered the meaning of "indecent" in two statutes governing interstate transportation, and said it was "prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California* * * *." 413 U.S. at 130 n. 7. Later, the Court applied that reasoning to a mail statute in *Hamling* v. *U.S.,* 418 U.S. 87. In neither case did this Court make any refer-

ence whatsoever to Section 1464 or to radio communication.

On the other hand, this Court has recognized, in a long line of cases, that broadcasting is different from other media of communications for some regulatory purposes.[24] Our contention rests on two propositions: that broadcasting has unique qualities, and that broadcast licensees bear special obligations. Because these factors distinguish it from other means of communication, the cases on which Pacifica and Chief Judge Bazelon relied do not foreclose this Court from determining that "indecent" has a separate and distinct meaning from "obscene" in Section 1464.

The FCC rested heavily upon this Court's finding that "the values of parental direction of the religious upbringing and education of their children in their

[24] Compare *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (political-editorial and personal attack rules upheld) *with Mills* v. *Alabama*, 384 U.S. 214 (1966) (prohibition of election day editorial invalidated); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (right to reply, but no right to buy time), *with Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (no right to reply in newspaper). See also *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 384 (1977) (broadcasting warrants "special consideration"); *Buckley* v. *Valeo*, 424 U.S. 1, 49–50 n. 55 (1975) (broadcasting gives rise to "unique and special problems not present in the traditional free speech case"); *Pittsburgh Press Co.* v. *Human Relations Comm.*, 413 U.S. 376, 387 (1973) (broadcasting has "peculiar characteristics" which distinguish it from newspapers); *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582, 586 (D.D.C. 1971), *affirmed sub nom. Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U.S. 1000 (1972) ("The fact is that there are significant differences between the electronic media and print.")

early and formative years have a high place in our society." *Wisconsin v. Yoder,* 406 U.S. 205, 213–214; *Ginsberg* v. *New York,* 390 U.S. 629; *Rowan* v. *Post Office Dept.,* 397 U.S. 728. Young children lack the judgment necessary to consent to exposure to patently offensive language depicting sexual and excretory activities and organs. When unsupervised, they constitute a captive audience incapable of avoiding exposure. Forcing such material upon young unsupervised children in their homes under the pretense of preserving so-called adult access rights is precisely the sort of intolerable intrusion on privacy that this Court has sought to proscribe. *Rowan* v. *Post Office Dept.,* 397 U.S. 728.[25]

In the paragraphs that follow, we discuss briefly the two factors that we believe distinguish broadcasting from other media of expression for purposes

[25] In recent decisions, this Court has limited adult access rights even in non-broadcast cases. In *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), for instance, the Court held that a theater owner was not immune from prosecution because performances were attended solely by consenting adults. See also *United States* v. *Thirty Seven Photographs*, 402 U.S. 363 (1971) (seizure of materials intended for private use from the luggage of a returning tourist); *United States* v. *Reidel*, 402 U.S. 351 (1971) (upholding federal statute prohibiting the mailing of material to consenting adults). *Paris* established that so-called adult access rights end when they cause an intolerable intrusion upon the privacy of others. When such an intrusion occurs, the Court said, the interest of the state in the quality of life and the total community takes precedence over any right of access. 413 U.S. at 69, See also *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205.

of regulating indecency: the peculiar characteristics of the broadcast media, and regulation of licensees under the public interest standard.

1. In its 1960 *Programming Policy Statement,* the Commission stated:

> [R]adio and TV programs enter the home and are readily available not only to the average normal adult but also to children and to the emotionally immature * * *. Thus, for example, while a nudist magazine may be within the protection of the First Amendment * * * the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. 1464 * * *. Similarly, regardless of whether the "four-letter words" and sexual description, set forth in *"Lady Chatterley's Lover,"* (when considered in the context of the whole book) make the book obscene for mailability purposes, the utterance of such words or the depiction of such sexual activity on radio or TV would raise similar public interest and Section 1464 questions.

Programming Policy Statement, 44 FCC at 2307 (quoting the Commission's brief in *Grove Press* v. *Christenberry,* No. 25,861, 2d Circuit).

A decade later the President's Commission on Obscenity and Pornography, which recommended abolition of *all* obscenity laws, agreed that broadcasting should be subject to specific rules to be enforced by the FCC "should the need arise," because there was "a potential in this area for thrusting sexually explicit materials upon unwilling persons."[26] During the 1970s, more and more complaints from the general public and Congress called upon the FCC to act. See, *e.g., WUHY, supra,* 24 FCC 2d 408; Sonderling *Broadcasting Corp., supra,* 41 FCC 2d at 778 and n. 6; *The Trustees of the University of Pennsylvania,* 57 FCC 2d 782.

Before considering the indecency prohibition in this case, the Commission first attempted to identify those factors which distinguish broadcasting from other methods of communication. Four important considerations were identified:

> (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see *Rowan* v. *Post Office Dept.* * * *; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which

[26] *The Report of the Commission on Obscenity and Pornography,* Bantam Ed. (1970), p. 73, n. 11, stated: "The broadcasting or telecasting of explicit sexual material has not constituted a serious problem in the past. There is, however, a potential in this area for thrusting sexually explicit materials upon unwilling persons. Existing federal statutes imposing criminal and civil penalties upon any broadcast of 'obscene' material do not adequately address this problem because they do not describe with sufficient specificity what material would be prohibited, or under what conditions. Hence, the repeal of these statutes is recommended, upon the understanding that the Federal Communications Commission either already has, or can acquire through legislation, adequate power to promulgate and enforce specific rules in this area should the need arise."

> the government must therefore license in the public interest.

(App. 13.)

Radio communication is unique because it is directed indiscriminately toward the public. It is both pervasive and intrusive. Listening to the radio, a passive act, is different from reading a book or magazine or watching a movie. To gain access to risque literature or motion pictures, a consumer must enter a store or theater and make a purchase. Book store and movie theater proprietors can exclude persons who are under age. Parents also find it simpler to regulate the use of magazines, books and movies. Parents can and do segregate from the family library books considered unsuitable for children. Parents can and do monitor the movies their children must pay to see. But broadcasts are much more difficult for parents to supervise. Broadcasts are easily accessible to young persons even in the privacy of the home, without the need for comparable affirmative acts. Unlike a book store owner or theater operator, a broadcast licensee cannot rely upon parental scrutiny as an effective means of sorting out and excluding youthful customers.

Judge Leventhal summed up these differences succinctly:

> A crucial reality, dominating the case at hand, is the widespread access of radio to children. Radio is relatively inexpensive in initial capital cost, and virtually a free good in terms of operating expense. Widespread freedom of selection of programs by children is not only a

> condition, it is often a necessity. Today, a majority of families with school-age children have working mothers, and one out of five children in the United States live with only one parent, so that many children are at home unsupervised during the day. In this totality of conditions, one cannot waive away the radio–TV problem on the ground that the (mature) person can readily switch the channel.
>
> * * *
>
> The reality of broadcasting's special access to the home conjoins with the passivity of TV–radio reception—a mere click, without current purchase. Indeed there is passivity after the click, with TV–radio stations being frequently left to a dial position previously set, unless there is an "alert" of some kind.

(App. 99, 100; footnote omitted.)

Although many parents try to monitor their children's viewing and listening—particularly during the evening when parents themselves rely on radio and television for entertainment—it is unrealistic to expect parental oversight all the time. When unsupervised children are in the audience, Section 1464 and the public interest standard require broadcasters to recognize this fact and to program accordingly. A broadcaster should not force parents to accept the risk that children will be exposed to broadcasts of patently offensive words depicting sexual and excretory activities or organs. As Judge Leventhal pointed out, "Even the most earnest advocates of

freedom accept the role of government in protecting those who lack capacity." (App. 102.)

The differences go to *avoidance* as well as to *access*. Just as children may gain access to offensive material over the air without affirmative action on their part, so it requires affirmative acts of avoidance to escape the stuff once it has come on the air. Young children may have neither the capacity to consent to nor the judgment to avoid what many parents believe would be inappropriate for them to see or hear. While a broadcast may have value for adults, this "does not mean it has such value in a broadcast geared to children—or in a broadcast where a substantial number of children are likely to be in the audience without parental supervision."[27]

Congress, the Commission, and the Courts have recognized the significant differences between electronic and print media, especially where young people are involved. In 1969, Congress made "unlawful the advertising of cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."[28] When that law was challenged on First and Fifth Amendment grounds, the district court, in upholding the ban, recognized that cigarette ads which were broadcast "were particularly effective in reaching a very large audience of young people." *Capital Broadcasting Co.* v. *Mitchell,* 333 F. Supp. 582, 585–86 (D.D.C.1971),

[27] Judge Leventhal, dissenting in this case, and citing *Ginsberg* v. *New York*, 390 U.S. 629. (App. 105.)

[28] 84 Stat. 89, 15 U.S.C. § 1335.

aff'd, 405 U.S. 1000. (1972). The court found "strong evidence of a great attraction on the part of young people to the broadcast media." 333 F. Supp. at 586 n. 13, and observed:

> Congress knew of the close relationship between cigarette commercials broadcast on the electronic media and their potential influence on young people, and was no doubt aware that *the younger the individual, the greater the reliance on the broadcast message rather than the written word.* A pre-school or early elementary school age child can hear and understand a radio commercial or see, hear and understand a television commercial, while at the same time be substantially unaffected by an advertisement printed in a newspaper, magazine or appearing on a billboard.

333 F. Supp. at 586 (emphasis added).

2. Government has a vital role in regulating the use of the limited radio spectrum. The scarcity of frequencies imposes special obligations on broadcasters, and warrants closer government scrutiny of radio than of other media. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, rested upon the finding that broadcasting consumed scarce spectrum space, a feature which would justify different First Amendment standards. Writing for this Court, Mr. Justice White stated:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish.

395 U.S. at 388. The Court reaffirmed that principle in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. at 101, recognizing "an unusual order of First Amendment values."

The D.C. Circuit dramatically outlined the rights of the public and the obligations of the broadcasters and the FCC in *United Church of Christ* v. *FCC,* 359 F. 2d 994 (1966). That Court, through then Circuit Judge Burger, stated:

> A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot * * *. [A] broadcast license is a public trust subject to termination for breach of duty.

359 F. 2d at 1003.

The station licensee in this case ignored its special obligations, in essence claiming a right to be judged by the standard which might apply to a privately operated "adult" entertainment establishment and not the higher standard applicable to public trustees. *Lorain Journal* v. *FCC,* 351 F. 2d 824, 830 (D.C. Cir. 1965), *cert. denied,* 383 U.S. 967 (1966); *Yale Broadcasting* v. *FCC,* 478 F. 2d 594 (D.C. Cir.), *cert. denied,* 414 U.S. 914 (1973).

Since the beginning of radio regulation, courts have recognized that broadcasters are public trustees subject to a higher standard of conduct than the morals of the marketplace. *KFKB Broadcasting Ass'n.* v. *F.R.C.,* 47 F. 2d 670; *Lorain Journal,* 351 F. 2d at 830. See generally, *Freedom and Responsibility in Broadcasting,* pp. 96–170, Northwestern U. Press (1961), for a comprehensive historical review of government regulation of broadcasting.

Broadcasters must program in the public interest of the community they are licensed to serve, and the FCC may *not* grant, modify, or renew a broadcast license without finding that the operation of the station is in the public interest. 47 U.S.C. §§ 307(d), 308, 309; *United Church of Christ* v. *FCC,* 425 F. 2d 543. "An important element of the public interest * * * is the ability of the licensee to render the best practicable service to the community reached by his broadcasts * * *." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 216. The Commission, local citizens and broadcasters have struggled to perfect the methodology for carrying out this duty.[29]

Recently, after lengthy rulemaking proceedings, the Commission issued a *Children's Television Report and Policy Statement,* 50 FCC 2d 1, *affirmed sub nom. Action for Children's Television* v. *FCC,* 564 F. 2d 458 (D.C. Cir. 1977). The report concluded that: "Broadcasters have a special responsibility to children." 50 FCC 2d at 5, 11. In affirming the report, the D.C. Circuit characterized it as simply clarifying "the efforts expected of broadcast licensees in fulfilling

[29] See *e.g., Henry* v. *FCC,* 302 F. 2d 191 (D.C. Cir.), *cert. denied,* 371 U.S. 821 (1962); *Stone* v. *FCC,* 466 F. 2d 316, 323, n. 21 (D.C. Cir. 1972); *Primer on Ascertainment of Community Problems by Broadcast Applicants,* 27 FCC 2d 650, 36 Fed. Reg. 4092 (1971), *modified,* 57 FCC 2d 418, 41 Fed. Reg. 1372 (1976).

their public interest obligations to the child audience." 564 F. 2d at 480.

Shortly after the adoption of the declaratory order in this case, the Commission reported to Congress on the steps that could be taken to protect children from objectionable programs. *Report on Broadcast of Violent, Indecent and Obscene Material,* 51 FCC 2d 418. A unanimous Commission adopted the report to Congress, which reached this conclusion:

> *With respect to questions of obscene and indecent material, direct governmental action is required by statute, and the Commission intends to meet its responsibilities in this area.* With respect to the broader question of what is *appropriate* for viewing by children, the Commission is of the view that industry self-regulation is preferable to the adoption of rigid governmental standards. We believe the this is the case for two principal reasons: (1) the adoption of rules might involve the government too deeply in programming content, raising serious constitutional questions, and (2) judgments concerning the suitability of particular types of programs for children are highly subjective.

51 FCC 2d at 419 (emphasis added).

In its declaratory order the FCC sought to give discrete meaning to the indecency prohibition in 18 U.S.C. § 1464, which the agency is obligated to enforce by regulatory action. This statutory prohibition applies only to the broadcast media, which for the variety of reasons set forth above are different from other modes of expression and therefore warrant different treatment.

II. THE COMMISSION'S ORDER SHOULD HAVE BEEN REVIEWED AS A RULING ON A SPECIFIC SET OF FACTS, AND, AS SUCH, SHOULD HAVE BEEN AFFIRMED AS A REASONABLE AND LAWFUL FINDING OF INDECENCY UNDER THE STATUTE AS APPLIED.

Although the Commission in this case resolved a specific complaint and limited its holding to the language "as broadcast," the majority below treated the opinion and order "as though it prohibited any TV or radio broadcast which included one of the seven words * * *." (App. 93.) On the basis of that erroneous reading of the order, two judges found it to be over-broad and vague.[30] But, as Judge Leventhal pointed out in dissent:

> The Commission held only "that the language *as broadcast* was indecent and prohibited by 18 U.S.C. 1646". The words were indentified as depicting "sexual activities and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast media," and further identified as "prerecorded language with the words repeated over and over * * * deliberately broadcast." But over and above the Commission's focus on the deliberate repetition of these words, was a clear

[30] Review of an *ad hoc* ruling on specific facts under an "overbreadth" approach is puzzling. Neither judge in the majority found the *statute* overbroad; nor were any FCC *rules* or *regulations* struck down as overbroad. It would seem that the majority found the potential for overbreadth in the rationale underlying the Commission's *ad hoc* ruling on the Pacifica complaint. We question the logic of such an analysis. See generally, Note: *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970).

and crucial emphasis on the timing of the broadcast. It was vital to the order that the words were broadcast "in the early afternoon" when "children were undoubtedly in the audience." The order specifically stated that the prohibition of the "broadcast of 'filthy words' considered indecent particularly when children are in the audience" would not force on the general listening public ideas "fit only for children."

Commissioners Reid and Quello stated that in their view the declaratory order should have gone further and prohibited such language at any time of the day or night. That was a minority expression. Chairman Wiley concurred only in the result. Commissioner Robinson, joined by Commissioner Hooks, concurred on the ground of time limitation, as a reasonable measure "to insist that programming of a kind whose broadcast to children would be thought inappropriate be confined to hours of the evening in which children would not ordinarily be exposed to the material—or at least not without the supervision of a parent."

In light of this array of concurrences, the Commission's decision must be read narrowly, limited to the language "as broadcast" in the early afternoon.

(App. 93–96; footnotes omitted.) The Commission believes its order should have been read narrowly and reviewed as an *ad hoc* ruling. See, clarification order in this case. (App. 41–44.) See also, *Yale Broadcasting Co.* v. *FCC*, 478 F. 2d at 602. When the Commission and the Courts confront a different set of

facts, they can then determine whether the principles announced in the declaratory order should be applied, modified or extended.[31]

It is especially appropriate to review the order narrowly in this case, because Pacifica never sought reconsideration from the Commission. Instead, it placed before the court below for the first time in a separate appendix a host of literary, dramatic, poetic, and religious works which were allegedly banned by the Commission's ruling. The majority below, instead of reviewing the Commission's narrow holding, concluded that the Commission had banned these works. (App. 54 n. 15, 60 n. 19.)

The error of the court below may be traceable to Pacifica's conduct of the case. Because the Commission never was asked to consider Pacifica's literary materials, there was nothing in the record to indicate whether the Commission had intended to reach them

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[31] This process already has begun with the Commission's action on a petition for clarification of the declaratory order. (App. 41–44.) The Commission added further gloss to the staute and its application in comments filed with Congress on a legislative proposal for amendment of the broadcast obscenity-indecency statute. In those comments, the Commission expanded on it views as to what constitutes a "child" and what it believes to be appropriate regulation of "indecent" material when children are not in the audience. See FCC's Legislative Proposal and Comments, reported at 122 Cong. Rec. S17101–17111 (Sept. 29, 1976), S17106 and S17109 nn. 118–123. It is altogether appropriate for the Commission to use "an approach much like that used by the courts, disposing of particular cases presented with an indication of underlying principles—so long as there is judicial review." (App. 103.) That is what the Commission is doing in this difficult regulatory area. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 395–96; *Yale Broadcasting* v. *FCC*, 478 F. 2d at 602.

with its prohibition. The majority might have assumed that Pacifica had properly brought those materials to the Commission and that the agency had deliberately left their status unresolved. But this was not the case.

The Commission had ruled only on the language as broadcast, while taking the opportunity to issue a declaratory order that would guide the public and broadcast licensees. Pacifica's post-record parade of horribles—apparently accepted by a majority of the court below—simply clouded the narrow decision that had been made. Both of the opinions below which reversed the FCC's decision failed to review the matter as one disposing of a particular case. As a result, both opinions broadly disabled the Commission to perform its statutory duty to take action against indecent broadcast material.[32]

This Court has long recognized a special societal concern for protecting young children from sexually explicit materials. *Miller* v. *California*, 413 U.S. at 19; *Ginsberg* v. *New York*, 390 U.S. at 637–643. The concern recognizes not only the State's interest, *parens patriae*, in the moral and emotional adjustment of children, but also the right of parents to rear their children according to their own best judgment. *Wisconsin* v. *Yoder, supra*, 406 U.S. at 213–14.

[32] In a sense, we are contending that the court of appeals itself issued a ruling that is overbroad, in that it decided matters that were not before that court for review.

"Exposure to children marks a special enclave in the law of freedoms of publication." (App. 96.)[33]

The Commission shaped its declaratory order to protect this interest. In essence, the Commission held that the complainant in this case was entitled to assistance from the Commission where this broadcaster, who has been entrusted with a scarce public resource, abused that special trust by broadcasting for nearly twelve minutes a record which repeated over and over words which depict sexual or excretory activities and organs in a manner patently offensive by its community's contemporary standards in the early afternoon when children were in the audience.[34]

As Judge Leventhal observed, the government has the authority under the Constitution

> to assist parents in their protection of young children during the uniquely prolonged period of development needed to permit the emergence of a competent and consenting person, and to protect some privacy in the home and in residential and civic neighborhoods that are family

[33] "[A]State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Erznoznik* v. *City of Jacksonville*, 422 U.S. at 214 n. 11. See also Mr. Justice Stewart's concurring opinion in *Ginsberg* v. *New York*, 390 U.S. at 648–650.

[34] To a lesser extent, the Commission also recognized the rights of unconsenting adults "who do not want the type of language broadcast in this case thrust into the sanctuary of their homes. *Cf. Rowan* v. *Post Office Dept.*, 397 U.S. 728, 738." (App. 16.) As to unwilling adults, the broadcaster must make substantial efforts to warn them that indecent language will be broadcast. (App. 16.)

> areas of shared community space. The latter consideration is not priggishness, but reflects a value that Alexander Bickel identified * * * as society's concern with the quality of its community life.

(App. 106–07.) In *Erznoznik* v. *City of Jacksonville*, 422 U.S. at 209, Mr. Justice Powell indicated that selective restrictions on speech are permissible "when the speaker intrudes upon the privacy of the home * * * or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."

Radio communications present both of these special circumstances when children are in the audience. Accordingly, the Commission reasonably concluded that the intrusive qualities of the media require the channeling to appropriate time periods of patently offensive language depicting sexual and excretory activities and organs in the *narrow and precisely circumscribed context* where young, unsupervised children are likely to hear it in the privacy of the home. Dissenting from the judgment below, Judge Leventhal pointed out that broadcast licensees "have the ability to make time distinctions" and that "there is a distinction between the all-out prohibition of a censor, and regulation of time and place of speaking * * *." (App. 100–01.) See also *Young* v. *American Mini Theaters, Inc.*, 427 U.S. at 63 n. 18.

The Commission was aware of *Cohen* v. *California*,

403 U.S. 15 (1971), and its progeny.[35] But those cases did not deal with the broadcast media, which for the reasons articulated by the Commission require the recognition of other conflicting interests. The Commission found significant Mr. Justice Harlan's observation that "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot totally be banned from the public dialogue." 403 U.S. at 21. It was to give some recognition to this privacy interest, especially when unsupervised children were likely to be in the audience, that the Commission issued its declaratory order. Protection of children was at the heart of the Commission's order, and as Judge Leventhal pointed out in dissent, "protection of children is a compelling state interest." (App. 107.)

Charles Rembar, one of the more successful advocates of freedom of expression in this Court during the 1960's, recently acknowledged that the law in this area has evolved to the point where competing interests and rights should be recognized.[36] Two of the interests he identified parallel those which the Commission's declaratory order recognized—the pro-

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[35] *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Rosenfeld* v. *New Jersey*, 408 U.S. 901 (1972); *Brown* v. *Oklahoma*, 408 U.S. 914 (1972); *Lewis* v. *New Orleans*, 408 U.S. 913 (1972); *Cason* v. *City of Columbus*, 409 U.S. 1053 (1972); *Papish* v. *University of Missouri Curators*, 410 U.S. 667 (1973); *Plummer* v. *City of Columbus*, 414 U.S. 2 (1973); *Hess* v. *Indiana*, 414 U.S. 105 (1973); *Lewis* v. *New Orleans*, 415 U.S. 130 (1974); *Eaton* v. *City of Tulsa*, 415 U.S. 697 (1974).

[36] Rembar, "Obscenity—Forget It," *Atlantic Monthly*, May 1977, pp. 37–41.

tection of children, and the privacy rights of an unwilling audience. Expression may be channeled "to safeguard children or to prevent the infliction of unwanted displays on a captive audience." [37] And Archibald Cox has questioned whether "extending the protection of the First Amendment to sheer vulgarity, useful only in its ability to shock, does not give the vulgarities an imprimatur which contributes to the lowering of public discourse." [38] Since the moral influence of this Court's opinions extends "far beyond the limits of its decrees," Cox queried, "May not its amoral influence be similarly extended?" [39] In a similar vein, Judge Leventhal in dissent quoted with approval the observation that "The law, more than most lawyers seem to realize, is an ethical determinant and a moral force." (App. 107 n. 18.)[40]

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[37] *Id.*, 38.

[38] Cox, *The Role of the Supreme Court in American Government* (1976), pp. 44–48.

[39] *Id.*, 47–48.

[40] See Frankel, *The Moral Environment of the Law*, 61 Minn. L. R. 921, 924–35 (1977); Berns, *The First Amendment and the Future of American Democracy*, 188–205 (1976).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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FEBRUARY 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978